Proposed Rules

Federal Register
Vol. 69, No. 243
Monday, December 20, 2004

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

GOVERNMENT ACCOUNTABILITY OFFICE

4 CFR Part 21

Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts

AGENCY: Government Accountability Office.[1]

ACTION: Proposed rule.

SUMMARY: The Government Accountability Office (GAO) is proposing to amend its Bid Protest Regulations, promulgated in accordance with the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. 3551–3556, to implement the requirements in the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108–375, 118 Stat. 1811, enacted on October 28, 2004. The proposed amendments to GAO's Bid Protest Regulations implement the legislation's provisions related to the bid protest process, where a public-private competition has been conducted under Office of Management and Budget (OMB) Circular A–76, as revised on May 29, 2003, regarding an activity or function of a Federal agency performed by more than 65 full-time equivalent employees of the Federal agency. In this regard, the legislating grants designated representatives of an in-house competitor the status of an "interested party" to file a protest at GAO or the status of an "intervenor" to participate in a protest filed at GAO. In addition, consistent with the legislation, GAO is proposing to add a provision to its Bid Protest Regulations stating that GAO will not review the decision of an agency tender official to file a protest (or not to file a protest) in connection with a public-private competition. At this time, GAO believes that these proposed revisions are the only regulatory changes necessary to implement the statutory requirements expanding the definitions of an interested party and an intervenor in protests involving public-private competitions. GAO welcomes comments on these proposed revisions, as well as suggestions for changes to other areas of GAO's Bid Protest Regulations or the bid protest process at GAO relating to protests of public-private competitions conducted under OMB Circular A–76.

DATES: Comments must be submitted on or before February 18, 2005.

ADDRESSES: Comments may be submitted by e-mail at *RegComments@gao.gov*, or by facsimile at (202) 512–9749. Due to delivery delays, submission by regular mail is discouraged. Comments may be sent by Federal Express or United Parcel Service addressed to: Michael R. Golden, Assistant General Counsel, Government Accountability Office, 441 G Street, NW., Washington, DC 20548. GAO intends to make all comments filed available to the public, including names and other identifying information. Information in a submission that the sender does not believe should be released should be clearly marked.

FOR FURTHER INFORMATION CONTACT: Daniel I. Gordon (Managing Associate General Counsel), Michael R. Golden (Assistant General Counsel) or Linda. S. Lebowitz (Senior Attorney), (202) 512–9732.

SUPPLEMENTARY INFORMATION: On June 13, 2003, GAO published a notice in the **Federal Register**, 68 FR 35411, which sought comments on a number of issued concerning the effect of OMB's revisions to Circular A–76 (revised Circular), which governs how Federal agencies determine whether to transfer performance of commercial activities from the public to the private sector, or vice versa. Performance of Commercial Activities, 68 FR 32134 (May 29, 2003). These revisions make competitions involving in-house competitors more similar to private-private competitions conducted under the Federal Acquisition Regulation (FAR) than has previously been the case with the competitive sourcing process. GAO specifically solicited comments regarding two key legal questions, namely, whether the revisions made to the Circular affect the standing of an in-house competitor to file a protest at GAO and, if so, who should have the representational capacity to file such a protest. The notice also solicited comments on other procedural issues raised by the Circular's revisions.

In response to this notice, GAO received a total of 71 sets of comments: 1 letter from three members of Congress; 9 letters from agencies; 5 letters from unions; 7 letters from associations; 47 letters from individuals (including Federal employees); and 2 letters from private lawyers. Some of those submitting comments argued that no one has standing to protest on behalf of an in-house competitor without an amendment to CICA, which provides the statutory framework for GAO's bide protest function; others contended that the 2003 revisions to the Circular justified GAO finding that individual Federal employees and their unions now had standing to file protests without the need to amend CICA. GAO also received comments concerning a number of other procedural issues including, for example, the requirement to exhaust the administrative appeal process before filing a protest a GAO, the authority for GAO to review streamlined competitions involving 65 or fewer full-time equivalent employees, and the applicability of GAO's protective order procedures.

GAO carefully considered the comments received and ultimately addressed the in-house competitor standing issue in *Dan Duefrene; Kelley Dull; Brenda Neuerburg; Gabrielle Martin*, B–293590.2 *et al.*, April 19, 2004, CPD ¶ 82. In that decision, GAO concluded that, notwithstanding the May 29, 2003 revisions to OMB Circular A–76, the in-house competitor in a public-private competition conducted under the Circular was not an offeror and, therefore, under the current language of CICA, no representative of an in-house competitor was an interested party eligible to maintain a protest before GAO.

On the same day that the decision *Dan Deufrene, et al.* was issued, the Comptroller General sent a letter to the cognizant congressional committees, explaining that, based on GAO's legal analysis of its statutory authority to decide bid protests under CICA, because an in-house competitor did not meet the current CICA definition of an interested party, GAO was required to dismiss any

[1] Effective July 7, 2004, the agency's legal name became the Government Accountability Office pursuant to Pub. L. 108–271, 118 Stat. 811. GAO will amend title 4, chapter I of the CFR to reflect the name change.

protest filed by an in-house competitor. In the letter, the Comptroller General recognized that policy considerations, including the principles unanimously agreed to by the congressionally-chartered Commercial Activities Panel, weighed in favor of allowing certain protests by in-house competitors with respect to A–76 competitions and, as a result, Congress might want to consider amending CICA to allow GAO to decide such protests. Consistent with that letter, the National Defense Authorization Act for Fiscal Year 2005 amended GAO's statutory authority under CICA to decide protests filed by in-house competitors.

The proposed revisions to GAO's Bid Protest Regulations to implement the National Defense Authorization Act for Fiscal Year 2005 are set forth below:

Interested Party

In accordance with sec. 326(a) of the National Defense Authorization Act for Fiscal Year 2005, GAO proposes to add a new paragraph to paragraph (a) of 4 CFR 21.0 to expand the definition of an interested party to include the official responsible for submitting the Federal agency tender in a public-private competition conducted under OMB Circular A–76 regarding an activity or function of a Federal agency performed by more than 65 full-time equivalent employees of the Federal agency.

Intervenor

In accordance with sec. 326(c) of the National Defense Authorization Act for Fiscal Year 2005, GAO proposes to add a new paragraph to paragraph (b) of 4 CFR 21.0 to expand the definition of an intervenor to include a person representing a majority of the employees of the Federal agency who are engaged in the performance of the activity or function subject to the public-private competition conducted under OMB Circular A–76 regarding an activity or function of a Federal agency performed by more than 65 full-time equivalent employees of the Federal agency. In addition, based on the proposed expansion of the definition of an interested party, GAO proposes to revise paragraph (b) of 4 CFR 21.0 to expand the definition of an intervenor to include the official responsible for submitting the Federal agency tender.

Issues Not for GAO Review

In accordance with sec. 326(b) of the National Defense Authorization Act for Fiscal Year 2005, GAO is proposing to add a new paragraph to 4 CFR 21.5 to reflect that GAO will not review the decision of an agency tender official to file a protest (or not to file a protest) in connection with a public-private competition.

These proposed revisions reflect the only language in sec. 326 of the National Defense Authorization Act for Fiscal Year 2005 that directly amends GAO's bid protest authority under CICA. GAO does not believe that any other regulatory revisions are required at this time. GAO solicits comments on these proposed revisions, as well as suggestions for changes to other areas of GAO's Bid Protest Regulations or GAO's bid protest relating to A–76 protests under the revised Circular, including, for example, the applicability of GAO's protective order procedures. Prior to issuing final regulations, GAO will determine, based on the comments received in response to this notice of proposed rulemaking, whether additional revisions to GAO's Bid Protest Regulations are warranted. GAO also will consider whether any changes to the bid protest process in the context of GAO's considerations of A–76 protests under the revised Circular are required and, if so, the most appropriate means of publicizing these changes, for example, by revising GAO's Bid Protest Descriptive Guide.

Other Procedural Matters

With reference to the responses GAO received to its notice of June 13, 2003, GAO believes that it is appropriate here to address two issues raised in that notice—whether GAO would continue to apply the requirement that the protester first exhaust the administrative appeal process before filing its protest at GAO and whether GAO would hear protests of streamlined competitions authorized by the revisions to OMB Circular A–76. GAO notes that there was virtual unanimity from commenters concerning the resolution of these two issues.

GAO had a longstanding rule that it would generally not hear a protest regarding an A–76 cost comparison until the unique A–76 administrative appeal process provided by the agency was exhausted. GAO's position was based on considerations of comity and efficiency, and GAO recognized that there was no statutory or regulatory requirement that an offeror exhaust available agency-level remedies before protesting to GAO. The revised Circular abolished the unique A–76 administrative appeal process, instead providing that a directly interested party could contest at the agency various aspects of a standard competition and that the resolution of such contest by the agency would be governed by the procedures in FAR Subpart 33.103, which describe the agency-level bid protest process.

Under GAO's Bid Protest Regulations with the exception of the exhaustion rule GAO imposed for A–76 protests, a protester has never been required to file an agency-level protest before filing a protest at GAO. In light of the fact that the revised Circular abolishes the unique A–76 administrative appeal process and in accordance with the consensus view of the commenters, GAO has decided that it will not apply the exhaustion requirement to protests filed at GAO challenging A–76 competitions conducted under the revised Circular. In other words, protests concerning A–76 competitions under the revised Circular will be treated just like any other protest filed at GAO. Accordingly, as with non-A–76 protests, while a prostester challenging an A–76 competition may elect to seek resolution of its protest at the agency in the first instance, GAO will not require the protester to file an agency-level protest as a prerequisite to filing a protest at GAO.

Regarding streamlined competitions, *i.e.*, competitions under the process reserved by the revised Circular for functions involving 65 or fewer full-time equivalent employees, the revised Circular states that no party may contest any aspect of the competition. In *Vallie Bray*, B–293840, B–293840.2, Mar. 30, 2004, 2004 CPD ¶ 52, GAO addressed the protest of a streamlined competition conducted under the revised Circular. GAO concluded that, where a streamlined competition is conducted without using the procurement system—that is, without a solicitation being issued—GAO lacks jurisdiction under CICA to consider a protest. If, however, an agency issues a solicitation as part of a streamlined A–76 competition, thereby using the procurement system to determine whether to contract out or to perform work in-house, GAO would consider a protest by an interested party alleging that the agency had not complied with the applicable procedures in the selection process or that the agency had conducted an evaluation that was inconsistent with the solicitation's evaluation criteria or applicable statutes and regulations. GAO intends to follow the *Vallie Bray* precedent with respect to protests of streamlined competitions conducted under the revised Circular.

List of Subjects in CFR Part 21

Administrative practice and procedure, Bid protest regulations, Government contracts.

For the reasons set out in the preamble, title 34, chapter I, subchapter

B, part 21 of the Code of Federal Regulations is proposed to be revised to read as follows:

PART 21—BID PROTEST REGULATIONS

1. The authority citation for part 21 continues to read as follows:

Authority: 31 U.S.C. 3551–3556.

2. Amend § 21.0 by redesignating paragraph (a) as paragraph (a)(1) and adding new paragraph (a)(2), and by redesignating paragraph (b) as paragraph (b)(1) and adding new paragraph (b)(2) to read as follows:

§ 21.0 Definitions.

(a)(1) * * *

(a)(2) In a public-private competition conducted under Office of Management and Budget Circular A–76 regarding an activity or function of a Federal agency performed by more than 65 full-time equivalent employees of the Federal agency, the official responsible for submitting the Federal agency tender is also an *interested party.*

(b)(1) * * *

(b)(2) If an interested party files a protest in connection with a public-private competition conducted under Office of Management and Budget Circular A–76 regarding an activity or function of a Federal agency performed by more than 65 full-time equivalent employees of the Federal agency, a person representing a majority of the employees of the Federal agency who are engaged in the performance of the activity or function subject to the public-private competition and the official responsible for submitting the Federal agency tender as described in paragraph (a)(2) of this section may also be *intervenors.*

* * * * *

3. Amend § 21.5 by adding paragraph (k) to read as follows:

§ 21.5 Protest issues not for consideration.

(k) *Decision whether or not to file a protest on behalf of Federal employees.* GAO will not review the decision of an agency tender official to file a protest or not to file a protest in connection with a public-private competition.

Anthony H. Gamboa,

General Counsel, United States Government Accountability Office.

[FR Doc. 04–27615 Filed 12–16–04; 10:03 am]

BILLING CODE 1610–02–M

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

7 CFR Part 500

National Arboretum

AGENCY: Agricultural Research Service; Research, Education, and Economics; USDA.

ACTION: Proposed rule.

SUMMARY: The Department of Agriculture (USDA) seeks comments on a proposed rule change that would modify the rules of conduct at the United States National Arboretum (USNA) and the schedule of fees to be charged for certain uses of the facilities, grounds, and services at the USNA.

DATES: Comments must be submitted on or before February 18, 2005.

ADDRESSES: Address all correspondence to Thomas S. Elias, Director, U.S. National Arboretum, Beltsville Area, Agricultural Research Service, 3501 New York Avenue, NE., Washington, DC 20002.

FOR FURTHER INFORMATION CONTACT: Dana Laster, Administrative and Marketing Manager, U.S. National Arboretum, Beltsville Area, ARS, 3501 New York Avenue, NE., Washington, DC 20002; (202) 245–4539.

SUPPLEMENTARY INFORMATION:

Classification

This rule change has been reviewed under Executive Order 12866, and it has been determined that it is not a "significant regulatory action" rule because it will not have an annual effect on the economy of $100 million or more or adversely and materially affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities. This rule change will not create any serious inconsistencies or otherwise interfere with actions taken or planned by another agency. It will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof, and does not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or principles set forth in Executive Order 12866.

Regulatory Flexibility Act

The Department of Agriculture certifies that this rule change will not have a significant impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, Pub. L. No. 96–354, as amended (5 U.S.C. 601, *et seq.*).

Paperwork Reduction Act

In accordance with the Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implement the Paperwork Reduction Act of 1995, Pub. L. 104–13, as amended (44 U.S.C. chapter 35), the information collection and recordkeeping requirements that have been imposed in the management of these programs have been approved by OMB and assigned OMB control number 0518–0024 for the use of facilities or the performance of photography/cinematography at the USNA.

Background

Section 890(b) of the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. 104–127 (1996 Act) expanded the authorities of the Secretary of Agriculture to charge reasonable fees for the use of USNA facilities and grounds. These authorities included the ability to charge fees for temporary use by individuals or groups of USNA facilities and grounds consistent with the mission of the USNA. In addition, authority was granted to charge fees for the use of the USNA for commercial photography and cinematography. Pursuant to the Act, the Agricultural Research Service (ARS) promulgated a fee schedule for the USNA at 7 CFR part 500, subpart B. All rules and regulations noted in 7 CFR part 500, subpart A, Conduct on the U.S. National Arboretum Property, also apply to individuals or groups granted approval to use the facilities and grounds.

This proposed rule change modifies 7 CFR part 500, subparts A and B. The USNA will continue to charge fees for riding its tram service, for use of the grounds and facilities, and for photography and cinematography. The USNA will allow use of its facilities and grounds for activities such as luncheons, dinners, receptions, and similar events in order to provide financial support to the USNA. The Director of the USNA will continue to have discretion to waive fees for non-profit scientific or educational organizations the purposes and interests of which are complementary to the mission of the USNA, such as the Friends of the National Arboretum, the National Bonsai Foundation, and the National Capital Area Federation of Garden Clubs. Even in cases of fee waiver, however, the USNA will seek to recover costs incurred in connection with use of its facilities. Fees generated will be used to defray USNA expenses

Corrections

Federal Register
Vol. 69, No. 246
Thursday, December 23, 2004

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–19613; Directorate Identifier 2004–SW–38–AD; Amendment 39–13870; AD 2004–23–15]

RIN 2120–AA64

Airworthiness Directives; MD Helicopters, Inc. Model MD900 Helicopters

Correction

In rule document 04–25542 beginning on page 67805 in the issue of Monday, November 22, 2004, make the following correction:

On page 67805, in the first column, under the **DATES** heading, in the second paragraph, in the third line, "January 21, 2004" should read, "January 21, 2005."

[FR Doc. C4–25542 Filed 12–22–04; 8:45 am]

BILLING CODE 1505–01–D

GOVERNMENT ACCOUNTABILITY OFFICE

4 CFR Part 21

Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts

Correction

In proposed rule document 04–27615 beginning on page 75878 in the issue of Monday, December 20, 2004, make the following corrections:

1. On page 75878, in the first column, under the **SUMMARY** heading, in the 23rd line, "legislating" should read, "legislation".

2. On the same page, under the **SUPPLEMENTARY INFORMATION** heading, in the third column, in the second line, "should" should read, "would".

3. On the same page, in the same column, in the first paragraph, in the 13th line, "bide" should read, "bid" and in the 24th line, "a" should read, "at".

4. On the same page, in the same column, in the second paragraph, in the 7th line, the citation "April 19, 2004, CPD ¶ 82" should read, "April 19, 2004, 2004 CPD ¶ 82".

5. On page 75879, under the **Issues Not for GAO Review** heading, in the second column, in the first paragraph, in the 4th line, "considerations" should read, "consideration".

6. On the same page, in the third column, in first paragraph, in the first line, "Regulations" should read, "Regulations,".

7. On the same page, in the same column, the List of Subjects heading is corrected to read as follows:

List of Subjects in 4 CFR Part 21

8. On the same page, in the same column, in the last line, "title 34" should read, "title 4".

[FR Doc. C4–27615 Filed 12–22–04; 8:45 am]

BILLING CODE 1505–01–D